IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 744 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BHAGVANBHAI K TADVI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
NOTICE SERVED for Appellant(s) : 1,MR GIRISH PATEL for Appellant(s) : 1,
MS MEETA PANCHAL, ADDL. PUBLIC PROSECUTOR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 28/06/2007

ORAL JUDGMENT

1. Being aggrieved and dissatisfied with the The judgment and order of conviction dated 24.07.1992 passed

by the ld. Addl. Sessions Judge, Bharuch, Camp at Rajpipla in Sessions Case No.69/1990 whereby the ld. Judge has convicted the appellant accused for the offence punishable under section 436 of IPC and sentenced him to undergo R/I for 3 Years and to pay a fine of Rs.500/, I/d to undergo R/I for 6 Months, the present appeal has been preferred under section 374 of CrPC by the appellant convict -original accused NO.1. The appellant accused has challenged the legality and validity of the order of conviction and sentence on various grounds mentioned in para-3 of the memo of appeal.

2. Shri Manoj Shrimali, ld. Counsel appearing on behalf of ld. Counsel Mr. Girish Patel for the appellant accused has taken me through all the grounds of challenge as well as the case of the prosecution that was placed before the ld. Trial Judge. He has also taken me through the oral as well as documentary evidence led during the course of trial which includes the evidence of two eye witnesses and the complainant who is the official of the Forest Department of Govt. of India. Panchanama is also tendered in evidence and the same is also on record. According to ld. Counsel Mr. Shrimali, ld. Trial Judge has grossly erred in holding the accused guilty and that too in linking the accused with the crime punishable under section 436 of IPC. There was neither any intention nor an act of the accused to play mischief by

fire to the house as defined in section 436 of IPC. It is submitted that the accused is a poor tribal and at relevant point of time, was living in a village of taluka Nandod. A very small parcel of land was acquired by the State of Gujarat for Narmada Dam Project and in the area of his village, Forest Department had undertaken some work of planting trees etc. Certain labourers were working as manual labourer with the office of Forest Department and on the strength of the complaint made by two of such labourers, the original complainant had lodged the complaint with police about the serious offence punishable under section 436, 506(2), 504 R/w 114 of IPC. The ld. Addl. Sessions Judge, at the conclusion of trial, acquitted original accused no.2 i.e. uncle of the present appellant accused and held the present appellant accused guilty for the offence punishable under section 436 of IPC and sentenced him as aforesaid. The witnesses who have not been believed by the ld. Trial Judge qua the offence punishable under section 506(2) or 504 of IPC, have been believed qua the overt act of setting fire to a small hut allegedly erected by the forest department with the help of tarpolyne so that material of the forest department can be put into it. Such a small hut temporarily erected can not be equated with the word “house” or “dwelling house” as used in section 436 of IPC. According to Mr. Shrimali, the ld. Trial Judge at the most could have linked the accused

with the crime punishable under section 435 of IPC than the more graver offence punishable under section 436 of IPC. The alleged act of the accused at the most was the mischief to a property of the government.

3. Mr. Shrimali, ld. Counsel for the appellant accused, in response to the query raised by the Court, has accepted that the presence of the witnesses believed by the ld. Trial Judge is a genuine presence and they had no reason as such to implicate the accused in such a grave offence. If any of these two witnesses had personal grudge against the accused, they could have rushed to the police station themselves. FIR can be said to be delayed by the forest officials. However, there was no reason for the forest official to implicate the accused persons in the crime. The prosecution has not supposed to prove the motive because on many occasions the motive may be hidden in the mind of the accused.

4. After arguments of ld. APP Ms. Panchal, ld. Counsel Mr. Shrimali has fairly accepted that the appellant may accept that the witnesses who were present at the spot have been rightly believed by the

trial Court and there was no reason for them to implicate the accused falsely, but the accused being a poor tribal and when the gravity of the offence is much less than the offence punishable under section 436 of IPC, the quantum of punishment should be reduced substantially and the Court also should think to give advantage of Probation of Offenders Act.

5. The plain reading of the evidence clearly establishes the presence of the accused at the spot of incident as well as from the oral evidence of the witnesses examined by the prosecution viz. PW.2 Dalpatbhai Manilal Exh.10 and P.W.3 Zaverbhai Valjibhai Exh.11. The offending act has been committed at about 4.00 p.m. meaning thereby during the broad-day light and so there is no question of mistaken identity of the accused. These witnesses have also named other labourers who were working and and they were asked to prepare polythene bags so that they can be used to grow small plants. They were supposed to work up to 5.00 p.m. and hence their presence at the spot at about 4.00 p.m. is not required to be viewed with any doubt. The say of

other two witnesses is consistent to the complaint exh.9 and, there are no material contradictions in the version of these two witnesses. So, the ld. Trial Judge has rightly accepted their evidence and has observed that there is no reason to disbelieve these two witnesses and so also the complainant P.W.1 Naranbhai Tetiyabhai Vasava - Exh.8.

6. The crucial question before the Court is whether the appellant accused could have been held guilty of the offence punishable under section 436 of IPC or not or for the offence lesser than that offence viz. for the offence punishable under section 435 of IPC. Here, I would like to quote section 436 of IPC whereby the mischief played by fire or explosive substance, if is found committed qua the property/building referred to in the said section and further if the property is not an agricultural produce, then any such mischief qua the property/building of the value of more than Rs.100/, is made punishable under this section. Section 436 of IPC reads thus:-

> “Sec.436 : Whoever commits mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

7(i) The complaint exh.9 is a complaint by a person who was informed in first point of time by two prosecution witnesses i.e. PW.2 Dalpatbhai Exh.10 and PW.3 Zaverbhai Exh.11. The complainant is not an eye witness. As per the complaint, some gunny bags and polythene bags worth Rs.35,000/ were destroyed in the incident. The property/building which has been destroyed in the incident has been described as “Zumpadi” meaning thereby a small hut. This erection of a hut was purely temporary and it is stated in the complaint specifically that nobody was residing in it. It was erected by straws and grass to keep some material that was being used by the labourers

employed by the Forest Department. Small polythene bags were mainly destroyed. There is no documentary evidence to prove the value of the material kept in that hut otherwise it must be there on the Dead-Stock Register.

(ii) The offence punishable under section 436 of IPC is a serious offence and, therefore, it is not possible for the Court to agree with the submission of ld. APP Ms. Panchal that section 436 of IPC would be attracted in the present incident. It is true that if a mischief by fire or by an explosive substance is played qua place for custody of the property or building, then provisions of section 436 of IPC would apply. Life Imprisonment is prescribed as punishment qua the offence punishable under section 436 of IPC. But if we look to the scheme of section 436 of IPC, the intention of the legislature is clear and, therefore, it is said in the said section that for "any mischief by fire or any explosive substance, intending to cause, or knowing it to be likely that he will thereby cause, the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the

custody of property", the person accused can be awarded sentence of imprisonment for life. Temporarily erected small hut to provide a cover to a property by itself can not be equated with a place for custody of a property/building referred to in section 436 of IPC because while considering these words i.e. "place for custody of property", the Court can not ignore other two aspects i.e. "place of worship" and "human dwelling". So, if any government godown or storage tank etc. of very high value or of public importance is set on fire, the provisions of section 436 of IPC would apply. The Allahabad Court, in the case of **Smt. Perbata v/s State, 1990 Cr.LJ 1665,** has observed that thatched shed on bamboos without doors is not a "building" within the term used in S.436 of IPC. In para-5, the Allahabad Court observed as under :- (Relevant portion)

> "....From the perusal of the statement of P.W.1 it appears that the structure made is only by Chhappar and not by bricks and it has no necessary furnishing such as doors, bars etc. Learned counsel for the appellant cited a case of ***Smt. Jashmero v. State of Haryana reported in***

1980 Cri.LJ NOC 46 (Punj and Har) in which relying on the case of of Allahabad High Court reported in ***1952 Cri.LJ 299*** held that the structure made of straw and not of bricks and mortar may be considered a building, if it has got necessary furnishing needed for a building such as doors bar etc. Section 435 IPC is wide enough to include the entire incidental loss suffered by the owner. But the distinction between the offence under sections 435 IPC and 436 IPC is that section 435 IPC envisaged mischief by setting fire to any property other than building whereas section 436 IPC envisage mischief by fire to any building which is ordinarily used as a human dwelling including place of custody of property or place of person. An ordinary thatched shed resting on bamboos or bricks pillar having no doors can not be treated as building within the meaning of the term used under section 436 IPC."

(iii) In the case of **Babulal & Others v/s State, AIR 1952 All.146,** way back in the year 1952, the

Allahabad High Court has observed that “a structure made of straw and not of bricks and mortar may be considered a building if it has got the necessary furnishings needed for a building, such as doors, bars etc. An ordinary double-thatched shed resting on bamboos or wooden or brick pillars having no doors etc. can not be treated as a building within the meaning of that term used in S.346, Penal Code.” in this decision, accused was charged to have played mischief with a place which was erected to keep a horse and horse-cart etc. Complainant Tangawala had some dispute that had created annoyance in the mind of one Madhusudan who had threatened PW Dalla and ultimately, when Dalla and his wife were sleeping, the place erected to keep a horse was set on fire.

(iv) Similar view has been taken in the case of **Bherulal and another v/s State of Rajasthan, 1999 Cri.LJ 4257.** In this decision, a wooden cabin was set on fire in the night by the accused, The Rajasthan High Court has observed thus:-

> “ My view is that a cabin which is removable which might be made of wood will not be covered under the meaning “building” which necessarily means the structure or any erection which is of permanent nature and is erected on the earth and some portion of it is embedded in earth. When

> the cabin burnt does not come within the definition of “building”, accused appellants could not have been convicted for offence under Section 436, IPC. Its burning might be a lesser offence i.e. 435, IPC.”

(v) In case of **State of Gujarat v/s Vedva Vaghari Moti Nagji & Anr., 1972 GLR 684,** the word “building” used in section 436 of IPC was considered. This Court was conscious about the facts of the case and in the cited decision has observed that “ .... Therefore, even a thatched but made of reeds and mud can be considered a structure and can be included within the meaning of the expression “building” for the purpose of sec.436 I.P.C. If the same is found utilized for human dwelling, or for custody of property. If the meaning of the word “building” is restricted only to the construction made with the help of materials generally used for constructing a pucca structure then we would be facing with an absurd situation wherein only the pucca buildings used by the richer section of the society would be protected and the kutcha structures and the huts used by the poor, would be found outside the purview of the protection which sec.436 I.P.C. Intends to give. (Para-6 of the judgment).”

This decision is the verdict of this Court in response to the reference made by the ld. Sessions Judge, Bhavnagar in criminal Revision Application filed whereby the ld. JMFC Palitana had discharged the opponents accused so far as the offence punishable under section 436 of IPC was concerned and had charged them for the offence punishable under section 435 R/w 114 of IPC. The facts placed before this Court in the cited decision were that the hut was meant for human dwelling and it was used for the residential purpose of the complainant and his family and so while dealing with the facts, the Court said that “ld. Magistrate, therefore, ought to have framed the charge not under section 435 R/w 114 of IPC, but under section 436 R/w 114 of IPC.” In the present case, the facts, as discussed earlier, are materially different and the building is not used as dwelling house or for residential purpose and, therefore, the above decision in the case of Vedva Vaghari Moti Nagji (supra) would not help the prosecution.

8(i) One of the arguments advanced by ld. Counsel Mr. Shrimali is not found acceptable whereby he has

submitted that the accused being poor tribal be given benefit of the Probation of Offenders Act. The accused has taken the law in hands. The government property worth Rs.30,000/ has been destroyed in the incident and it is very likely that for some days, 45 labourers who were getting their daily bread by employing themselves with the forest department, were rendered jobless. It is true that there is conflicting evidence as to the value of the property because one witness has said that the loss was of about Rs.1500/ to Rs.2000/.

(ii) The Court should not be too liberal and any activity in the nature of violent challenge to the State machinery, should not be taken in casual way. It is true that the applicant is a tribal but after all he was a prudent and responsible citizen and was aware about the activities undertaken by the State qua Narmada Dam. Agitation can be carried out in a most democratic, peaceful and polite way. The ultimate punishment prescribed under section 435 of CrPC is of 7 years. So, this argument of ld. Counsel Mr. Shrimali is not found acceptable. It is true that

a lighter punishment can be imposed. The alternative submission of Mr. Shrimali is that the Court should not impose punishment beyond the period of one month or at least it should not exceed the period of 3 months.

9. The ld. APP Ms. Panchal submits that the Court should pass any appropriate order as to imposition of punishment. The accused being a poor tribal, the Court may not impose or enhance the amount of fine otherwise this Court could have imposed a fine of some more amount in light of the damage caused to the State property by a criminal wrong committed by the accused.

10. The act of playing by fire is found proved beyond doubt. The appellant accused of course has not been charged for the offence punishable under section 435 of IPC, but as per the scheme of sub-section (2) of section 222 of CrPC, the accused can be held responsible for a lesser offence than charged and in my view, this is a fit case wherein the ld. Trial Judge ought to have held the appellant accused guilty of the charge for the offence punishable under section 435 of IPC. So, the

conviction under section 436 of IPC obviously shall have to be quashed and accused shall have to be held guilty and convicted for lesser offence than charged i.e. for the offence punishable under section 435 of IPC.

11. In view of above submission, the Court is of the view that if if R/I for 3 months is imposed on the appellant accused for the offence punishable under section 435 of IPC and a fine of Rs.500/, the same would serve the purpose. It would take appropriate message to the society and people at large in the area. Each punishment should not be deterrent. Any period which is sufficient to teach a good lesson to a wrong-doer can be imposed by the Court and, therefore, the Court R/I for 3 months without enhancing the amount of fine would meet the ends of justice. The accused shall be given advantage of the period for which he has remained in custody after his arrest meaning thereby he is entitled to set off.

12. The incident is old by January 1990. The accused has settled himself in the other area under the scheme of rehabilitation and so he should be given reasonable time to surrender to serve the sentence. The accused, therefore, if is directed to surrender himself to serve out the sentence before the trial Court within 30 days

from today, the same would meet the ends of justice. Ld. Counsel Mr. Shrimali states that he shall intimate the appellant accused. If accused fails in surrendering before the trial Court within 30 days from the date of judgment, it will be open for the trial Court be issued Non-Bailable Warrant for the arrest of the appellant accused so that his presence can be secured and he can be sent to prison to serve out the sentence. According to ld. Counsel Mr. Shrimali, the appellant accused is residing at village Vyadhar, Ta: Tilakwada of District: Narmada.

13. In the result, the present Criminal Appeal is partly allowed. The judgment and order of conviction dated 24.07.1992 passed by the ld. Addl. Sessions Judge, Bharuch, Camp at Rajpipla in Sessions Case No.69/1990 whereby the ld. Judge has convicted the appellant accused for the offence punishable under section 436 of IPC and sentenced him to undergo R/I for 3 Years and to pay a fine of Rs.500/, I/d to undergo R/I for 6 Months, is hereby quashed and set aside. Instead, the appellant accused is hereby held guilty and convicted for the offence punishable under section 435 of IPC and is sentenced to undergo R/I for 3 Months and to pay a fine of Rs.500/, I/d to undergo R/I for 1 Week for the offence punishable under section 435 of IPC. The appellant

accused has already paid fine of Rs.500/ and hence the same shall be treated as amount of fine paid for the offence punishable under section 435 of IPC.

14. The appellant accused was on bail pending trial and at present also the appellant accused is enjoying bail in view of the order passed by this Court on 20.08.1992 and, therefore, appellant accused should be given some reasonable time to surrender. The appellant accused, therefore, is directed to surrender himself 30 (thirty) days from the date of this judgment before the trial Court to serve out the sentence, failing which the trial Court shall issue Non-Bailable Warrant to secure the presence of the accused so that he can be sent to jail to serve the sentence. Bail Bonds of the accused stand discharged/cancelled on conclusion.

[C.K. BUCH, J]

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